



Date: JUN 15 2004

ON BEHALF OF PETITIONER:

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a doughnut shop. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year. The Form ETA 750 also states that the petitioner's doughnut shop, at which the beneficiary would be employed, is located at 485 South Rand Road, Lake Zurich, Illinois.

With the petition, counsel submitted a Lease Option Agreement, dated January 8, 1993, by which Shezad, Inc. leased the premises at 405 (sic)¹ South Rand Road in Lake Zurich, Illinois.

Counsel submitted the 1999 Form 1120S U.S. Income Tax Return for an S Corporation of A. Jay Bajrang, Inc. of 485 South Rand Road in Lake Zurich, Illinois, the address of the original petitioner's doughnut shop. That return shows that A. Jay Bajrang, Inc. declared ordinary income of \$5,405 during that year. The corresponding Schedule L shows that A. Jay Bajrang's current assets at the end of that year were -\$21,452 and its current liabilities were \$3,017. The net current assets of A. Jay Bajrang, Inc. at the end of that year, therefore, were negative.

Counsel submitted a Dunkin' Donuts Franchise Agreement, dated August 24, 1998, showing that A. Jay Bajrang, Inc. obtained a franchise for the Dunkin' Donuts location at 485 South Rand Road, Lake Zurich,

¹ This office suspects that the address discrepancy is merely the result of a typographical error.

Illinois from Dunkin' Donuts Incorporated. Counsel submitted additional documents pertinent to that franchise. The do not describe how the original petitioner, [REDACTED] lost the franchise.

Counsel submitted an Agreement to Transfer a Dunkin' Donuts Shop by the Sale of Assets, also dated August 24, 1998. That document shows that on that date Shezad, Inc. sold its interest in the doughnut shop at 469-E West Liberty Street, Wauconda, Illinois to [REDACTED]. That document does not apparently pertain to the original petitioner in this matter, [REDACTED] or to its doughnut shop at 485 South Rand Road in Lake Zurich. Counsel did not explain the relevance of that document to the instant case.

On September 13, 2002 the Nebraska Service Center issued a Request for Evidence in this matter. The Service Center noted that the original petitioner in this matter, shown on both the ETA 750 and the Form I-140 petition, is Sultan & Noor [REDACTED]. The Service Center requested evidence to demonstrate ownership of the Dunkin Donuts franchise at 485 South Rand on January 14, 1998, the priority date. The Service Center also asked for evidence that the original petitioner and any successor-in-interest had the continuing ability to pay the proffered wage.

In response, counsel submitted a letter, dated November 25, 2002, in which he stated that Sultan & Noor owned the business on the priority date, and that "A transfer of this business to [REDACTED] occurred on 8/21/98." With that letter, counsel submitted Sultan & Noor's 1997 and 1998 Form 1120S U.S. Income Tax Returns for an S Corporation. Those returns state Sultan & Noor's address during those years as 485 South Rand Road. Counsel submitted the 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns of A. Jay Bajrang, Inc. Those returns state that A. Jay Bajrang's address during those years was 485 South Rand Road.

The 1997 return shows that during that year Sultan & Noor declared ordinary income of \$29,005. The corresponding Schedule L shows that at the end of that year Sultan & Noor had current assets of -\$11,907 and current liabilities of \$79,049. [REDACTED] net current assets at the end of that year, therefore, were negative. This office notes, however, that the priority date of the petition is January 14, 1998. Information pertinent to the petitioner's finances during 1997 is not, therefore, directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 1998 return shows that [REDACTED] declared ordinary income during that year of \$0. The corresponding Schedule L shows that at the end of that year Sultan & Noor had current assets of \$0 and current liabilities of \$0, which yields net current assets of \$0.

The 2000 return shows that [REDACTED] declared ordinary income of \$42,027 during that year. The corresponding Schedule L shows that at the end of that year A. Jay Bajrang had current assets of \$29,058 and current liabilities of \$1,515, which yields net current assets of \$27,543.

The 2001 return shows that [REDACTED] declared ordinary income of \$2,444 during that year. The corresponding Schedule L shows that at the end of that year A. Jay Bajrang had current assets of \$9,619 and current assets of \$38,107. [REDACTED] net current assets at the end of 2001, therefore, were negative.

On February 10, 2003, the Director, Nebraska Service Center issued a decision denying the petition. The director stated that the original petitioner, Sultan & Noor, had failed to demonstrate its ability to pay the

proffered wage, and that insufficient documentation had been submitted to demonstrate that [REDACTED] Inc. is Sultan & Noor's successor-in-interest.

On appeal, counsel asserts that the documentation submitted sufficiently demonstrates that [REDACTED] is Sultan & Noor's successor-in-interest and that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date.

In a brief filed to supplement that appeal, counsel stated that [REDACTED] was the original petitioner, and that its gross receipts, gross profits, salary and wages, and depreciation deduction show the ability to pay the proffered wage.

Counsel further stated that [REDACTED] assigned its rights as lessee of the property upon which the doughnut shop is located to [REDACTED] on August 24, 1998, and that Amrut Patel and Jay Patel assumed all of the original petitioner's responsibilities under that lease. Counsel implies that this demonstrates that [REDACTED] are the original petitioner's successors-in-interest. Counsel relied on the total income of [REDACTED] apparently owned by [REDACTED], during 2000 and 2001 to show the ability of that substituted petitioner to pay the proffered wage.

In closing, counsel states that the original petitioner had the ability to pay the proffered wage, that it then assigned its rights to the substituted petitioner, and that the substituted petitioner also has the ability to pay the proffered wage. Counsel observes that the address of the substituted petitioner's doughnut shop is the same as the address of the original petitioner's doughnut shop. Counsel states that the original petitioner was a lessee who assigned its rights to the substituted petitioner. As such, counsel asserts that to require proof of a sale by the original petitioner to the substituted petitioner is inappropriate, as the transaction was assignment of a lease.

Counsel's reliance on the original petitioner's and substituted petitioner's gross receipts, gross profits, depreciation deduction, salary and wage expenses, and other expenses as indices of the ability to pay the proffered wage is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Demonstrating the amount of any of the petitioner's expenses is insufficient.

Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income³, the petitioner is obliged to show the ability to pay the proffered wage **in addition** to the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is a petitioner's ordinary income.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of

² The petitioner might demonstrate this, for instance, not by alleging, but by submitting evidence sufficient to demonstrate that beneficiary would replace a specific named employee, whose wages would then be available to pay the proffered wage.

³ The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, neither the original petitioner nor the substituted petitioner demonstrated that it employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount equal to or greater than the proffered wage during that period, the AAO will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.⁴

⁴ End-of-year net current assets are the taxpayer's end-of-year current assets, shown on Schedule L at lines 1(d), 2b(d), and 3(d), less the taxpayer's end-of-year current liabilities, shown on Schedule L at lines 16(d), 17(d), and 18(d). Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. Thus, if the net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

This office shall first consider the original petitioner's ability to pay the proffered wage. The priority date is January 14, 1998. The proffered wage is \$24,960 per year. The original petitioner must demonstrate that it had the ability to pay the proffered wage to the beneficiary from the priority date until it ceased to operate the business on August 24, 1998.

During 1998 Sultan & Noor declared no ordinary income. It ended the year with no net current assets. No evidence has been submitted which suggests that Sultan & Noor had any other funds with which to pay the proffered wage during the salient portion of that year. The evidence is insufficient to demonstrate that Sultan & Noor had the ability to pay the proffered wage from January 14, 1998 through August 24, 1998.

The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. The successor-in-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

In this case, counsel has satisfactorily demonstrated that the substituted petitioner, [REDACTED], assumed the lease of the original petitioner, [REDACTED], and the rights, duties, and obligations under that lease. Those may not, however, be all of the original petitioner's rights, duties, and obligations. Counsel did not provide any evidence to demonstrate that the substituted petitioner assumed all the original petitioner's duties and obligations.⁵ The substituted petitioner is obliged to show the nature of the transaction in which it acquired the original petitioner's business, and that as a result of that sale or other transfer it acquired **all** of the petitioner's duties and obligations, in addition to its rights and assets. Counsel has failed to show that either [REDACTED] and Jay Patel are the original petitioner's successors-at-interest.

Even if counsel had demonstrated that [REDACTED] was the original petitioner's successor-in-interest within the meaning of *Matter of Dial Repair Shop, Supra.*, counsel was still obliged to show that A. Jay Bajrang, Inc. had the continuing ability to pay the proffered wage beginning on the date it acquired the business.

The business transferred on August 24, 1998. The substituted petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1998, but only that portion which would have been due if it had hired the beneficiary on the priority date. The record, however, contains no evidence pertinent to any funds [REDACTED] may have had available during 1998.⁶ Counsel has not demonstrated that A. Jay

⁵ Sultan & Noor may have lost its interest in the doughnut shop through bankruptcy, for instance. In that scenario, and others, various obligations and duties might not transfer with the assets. In such a situation, the substituted petitioner would not qualify as a successor-in-interest within the meaning of *Dial Repair Shop*. Merely showing that the substituted petitioner operates a doughnut shop at the same location in which the original petitioner previously operated a doughnut shop is manifestly insufficient.

⁶ Counsel submitted no 1998 audited financial statements, annual reports, or federal income tax returns for A. Jay Bajrang, Inc.

Bajrang had the ability to pay the proffered wage during the portion of 1998 during which it owned the business.

During 1999 and ensuing years, [REDACTED] is obliged to demonstrate the ability to pay the entire proffered wage. During 1999, [REDACTED] declared ordinary income of \$5,405. That amount is insufficient to pay the proffered wage. At the end of that year, [REDACTED] had negative net current assets. [REDACTED] has not demonstrated that it could have paid any portion of the proffered wage out of its net current assets. No evidence in the file demonstrates that A. Jay Bajrang had any other funds at its disposal with which to pay the proffered wage. Counsel has not demonstrated, therefore, that A. Jay Bajrang was able to pay the proffered wage during 1999.

During 2000 [REDACTED] declared ordinary income of \$42,027. That amount was sufficient to pay the proffered wage. Counsel has demonstrated that [REDACTED] was able to pay the proffered wage during 2000.

During 2001, [REDACTED] declared ordinary income of \$2,444. That amount is insufficient to pay the proffered wage. [REDACTED] ended that year with negative current assets. The record contains no evidence that [REDACTED] had any other funds available to it with which to pay the proffered wage during 2001. Counsel has not shown that [REDACTED] had the ability to pay the proffered wage during 2001.

Counsel submitted insufficient evidence to demonstrate that the original petitioner had the ability to pay the proffered wage during the portion of 1998 after the priority date and before it relinquished control of the business. Counsel submitted insufficient evidence to demonstrate that [REDACTED] is the original petitioner's successor-in-interest within the meaning of *Matter of Dial Repair Shop*, Id. Even if A. Jay [REDACTED] were the petitioner's successor-in-interest, counsel submitted insufficient evidence to demonstrate that it had the ability to pay the proffered wage during the portion of 1998 during which it owned the business, during 1999, and during 2001. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.